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22 **UNITED STATES DISTRICT COURT**
23 **NORTHERN DISTRICT OF CALIFORNIA**

24 NICHOLAS KIS, on behalf of himself and all
25 others similarly situated,

26 Plaintiff,

27 v.

28 COGNISM INC.,

Defendant.

CASE NO.: 4:22-cv-05322-JST

DEFENDANT'S MOTION TO DISMISS
PURSUANT TO FRCP 12

Date: Thursday, March 2, 2023

Time: 2:00 PM Pacific Time

Courtroom: Oakland Courthouse,
Courtroom 6 – 2nd Floor

Judge Jon S. Tigar

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NOTICE OF MOTION AND MOTION

2 PLEASE TAKE NOTICE that on March 2, 2023, at 2:00 PM Pacific Time, Defendant
3 Cognism Inc. (“Cognism”) will move the Court for an order granting its motion to dismiss
4 Plaintiff’s Complaint (ECF No. 1).

STATEMENT OF REQUESTED RELIEF

6 Pursuant to Rule 12 of the Federal Rules of Civil Procedure, Cognism requests that the
7 Court grant its motion to dismiss the Complaint with prejudice.

MEMORANDUM OF POINTS AND AUTHORITIES

9 This is a case where the sole use of Plaintiff's name or information was occasioned by
10 Plaintiff's own attorney. He misrepresented himself to Cognism in order to gain access to
11 Cognism's platform of business-to-business contacts, and then used that platform to search for
12 and download information about Plaintiff when no other Cognism customer ever had, and where
13 Plaintiff's name and information were never used by Cognism at all in promoting its products.

14 Based on Plaintiff’s attorney’s own conduct, Plaintiff has now sued Cognism, advancing
15 four claims: (i) a violation of the California Right of Publicity Law (“CRPL”), Cal. Civ. Code
16 § 3344 (the “Publicity Claim”); (ii) a violation of the California Invasion of Privacy Act
17 (“CIPA”), Cal. Penal Code §§ 630 *et seq* (the “Privacy Claim”); (iii) a violation of California’s
18 Unfair Competition Law (“UCL”), Cal. Bus. & Prof. Code § 17200 *et seq* (the “Unfair
19 Competition Claim”); and (iv) a common law claim for misappropriation of name or likeness
20 (the “Common Law Claim”). As discussed fully below, Plaintiff’s effort to fabricate causes of
21 action against Cognism must fail as all four causes of action should be dismissed.

22 **First**, all four of Plaintiff's causes of action should be dismissed because Plaintiff lacks
23 standing—that is, he has not suffered any legally cognizable injury-in-fact. He does not
24 adequately allege that he has suffered the loss of any money or property (because he has not),
25 and his effort to establish standing on the basis of a claimed statutory violation or conclusory
26 allegations of “harm to peace of mind” also fail because those are not legally cognizable injuries.
27 Plaintiff lacks standing with respect to his Publicity Claim and Common Law Claim for the
28 additional reason that the factual underpinning of both of these claims—that Cognism uses

1 Plaintiff's name and information to advertise its products—is plainly false. Plaintiff alleges that
 2 "Cognism displays a profile of personal information about Mr. Kis on www.cognism.com" to
 3 promote its products. Compl. ¶¶ 8, 58-60. But this allegation is simply untrue and is surely
 4 known by Plaintiff's counsel to be untrue: Mr. Kis' name and information have **never** appeared
 5 on Cognism's public-facing website. Decl.¹ ¶ 25.² Plaintiff lacks standing with respect to his
 6 Privacy Claim, because the factual underpinning of that claim—that Cognism obtained
 7 information about Mr. Kis by intercepting and reading emails sent by and received from
 8 Cognism subscribers—is also false: Cognism **never** collected any information relating to
 9 Mr. Kis from subscriber emails. Decl. ¶ 17.

10 **Second**, even if Plaintiff had standing—and he does not—all of Plaintiff's claims fail as a
 11 matter of law. *Plaintiff's Publicity Claim and Common Law Claim* must each be dismissed
 12 because there has been no use or appropriation of Plaintiff's identity to advertise Cognism's
 13 platform. Unlike other companies against whom such claims have been sustained, Cognism does
 14 not use "teaser profiles" bearing a specific person's name to advertise paid subscriptions to its
 15 products. There is no "landing page" about any individual that would appear in search engine
 16 search results that could constitute an advertisement. There is no "view more" or "subscribe
 17 now" button or link on the Cognism platform that could constitute a solicitation. Instead, unlike
 18 the archetypal right-of-publicity claim—where a celebrity's identity is used to promote a
 19 separate product without his or her consent—the only time Plaintiff's name or information could
 20 possibly appear is when a subscriber is actually using Cognism's platform. As such, there is no
 21 use or appropriation of Mr. Kis' identity separate from the Cognism product itself, which is
 22 insufficient as a matter of law to sustain these claims. Moreover, even if accessing Mr. Kis'
 23 information were to be considered a use or appropriation of his identity, the fact that the only
 24 person to have ever viewed Plaintiff's information on Cognism's platform is Plaintiffs' own
 25
 26

27 ¹ All references to "Decl." are to the contemporaneously filed declaration of James Isilay.
 28 ² "In resolving a factual attack on jurisdiction, the district court may review evidence beyond
 the complaint" *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004).

1 attorney necessarily means that Plaintiff has not suffered the type of resulting “injury” he alleges.

2 Accordingly, the Publicity Claim and Common Law Claim must each be dismissed.

3 *Plaintiff’s Privacy Claim* must also be dismissed. Although pled as a single cause of
 4 action, Plaintiff asserts violations of three different sections of CIPA: Section 631 for
 5 wiretapping, Section 632 for eavesdropping on or recording confidential communications, and
 6 Section 637 for the disclosure of telegraphic or telephonic messages. All fail. The Section 631
 7 claim fails because Plaintiff has not alleged sufficient facts to suggest that Cognism intercepted
 8 the “contents” of any communication “in transit.” To state a claim under Section 631, there must
 9 be an interception of the substantive content of a communication contemporaneous with the
 10 transmission. Here, Plaintiff has not alleged any facts to suggest that any specific email sent to
 11 or received from Plaintiff was intercepted in transit—that is, simultaneous with transmission and
 12 prior to receipt.³ Moreover, the content of the information alleged to have been collected by
 13 Cognism (*i.e.*, email signatures) does not constitute the substantive “content” of any
 14 communication that could give rise to a CIPA claim. The Section 632 claim fails because
 15 Plaintiff has not alleged any electronic recording or eavesdropping, and Plaintiff’s email
 16 communications are not “confidential communication[s]” in any event, as required by Section
 17 632. This is because email communications can lawfully be forwarded or shared without the
 18 sender’s consent or knowledge. The Section 637 claim fails because Plaintiff has not alleged
 19 that the substantive “contents” of any “telegraphic or telephonic message” was disclosed. These
 20 deficiencies are fatal to his CIPA claim.

21 *Plaintiff’s Unfair Competition Claim* also fails as a matter of law. California law makes
 22 clear that, in order to sustain such a claim, a plaintiff must have suffered a loss of money or
 23 property. Here, Plaintiff’s allegations are insufficient as a matter of law to establish either.
 24 Accordingly, the Unfair Competition Claim must be dismissed.

25
 26 _____
 27 ³ Nor could Plaintiff truthfully make such an allegation, as Cognism does not intercept email
 28 communications from its subscribers. To the contrary, the subscribers from whom signature
 block information is captured expressly consent to have that information accessed by Cognism,
 and the process by which the information is obtained all occurs well after the fact of the email
 transmission. Decl. ¶¶ 8-14.

STATEMENT OF ISSUES TO BE DECIDED

1. Whether Plaintiff has satisfied his burden of alleging a legally cognizable injury-in-fact that is fairly traceable to Cognism's conduct for purposes of Article III standing.

2. Whether Plaintiff has adequately alleged a violation of the California Right of Publicity Law (“CRPL”), Cal. Civ. Code § 3344, or a California misappropriation claim.

3. Whether Plaintiff has adequately alleged a violation of the California Invasion of Privacy Act (“CIPA”), Cal. Penal Code §§ 630 *et seq.*, Sections 631, 632 and 637.

4. Whether Plaintiff has adequately alleged a violation of California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200 *et seq.*

STATEMENT OF FACTS

Cognism is a sales lead generation platform that helps companies connect with potential customers. Compl. ¶¶ 4, 6-7, 66. To facilitate such connections, Cognism collects information about business professionals, such as their employer, job title, office location, and contact information. Compl. ¶ 6. The first layer of data Cognism collects is from third-party data brokers, such as Pipl and CoreSignal, who sell “base” information (e.g., name, title) about business professionals to Cognism, often collected from a variety of public sources (e.g., website directories). Decl. ¶ 4. The vast majority of information on Cognism’s platform is collected through this process, which is a standard industry practice. Decl. ¶ 5. Cognism then confirms the integrity of the information, for example, by monitoring publicly available information from corporate websites and calling a listed phone number to confirm the identity of the recipient. Compl. ¶ 23; Decl. ¶ 6. Cognism also performs other checks to ensure the integrity of the data, including verifying that only business contact information (rather than personal contact information) is being collected and flagging any individuals who are on any government-run “Do Not Call” registries. Compl. ¶ 61 (showing “DNC” or do-not-call marker); Decl. ¶ 7.

For a brief period of time in the summer of 2022, Cognism experimented with additional data collection through the Cognism “Signatures” product, whereby Cognism offered certain customers access to an email signature standardization tool in exchange for access to the customer’s stored email communications. Compl. ¶¶ 19-20, 80; Decl. ¶ 8. The Signatures

1 product allowed Cognism to capture, with the customer’s consent, the email signature blocks of
 2 individuals with whom the customer’s employees were communicating and then added any new
 3 contact information (e.g., company name, company address, or business telephone) to an existing
 4 “base” profile. Compl. ¶¶ 20, 80; Decl. ¶ 9. The substantive contents of the email messages
 5 themselves were not collected, and no new profiles were generated as a result of this process;
 6 rather, existing profiles were simply supplemented. Decl. ¶ 11. ***None of the information***
 7 ***contained in Cognism’s platform relating to Mr. Kis was collected from the Cognism***
 8 ***Signatures product.*** Decl. ¶¶ 15-17.

9 Cognism’s aggregated database of verified information about business professionals is
 10 available through Cognism’s platform, which allows an individual to search by various criteria to
 11 identify potential sales leads. *See* Compl. ¶¶ 4, 6, 61, 66. As an example, the platform allows
 12 for an e-discovery vendor to search for lawyers in a given geography with a certain title, such as
 13 “discovery attorney,” and allows the user to download a list of potential sales targets. There is
 14 no “limited access” or “limited use” version of the platform; when a user gets access to
 15 Cognism’s platform, they have access to the entire platform and all of its information.
 16 Compl. ¶ 61; Decl. ¶ 20.

17 The Cognism platform has no teaser profiles or landing pages. Decl. ¶ 21. In other
 18 words, there is no standalone webpage containing an individual’s identity with a solicitation to
 19 buy anything—not a subscription to Cognism’s platform, not any particular individual’s contact
 20 information, or otherwise. Decl. ¶ 22. Consistent with this practice, Cognism also does not
 21 engage in search engine optimization (“SEO”) or indexing practices such that an individual’s
 22 information on Cognism would appear in a search engine search result. Decl. ¶ 23.
 23 Furthermore, the individuals whose names and likenesses appear on Cognism’s public-facing
 24 website are company employees who consented to use of their identities for marketing purposes,
 25 or are fictitious persons created for the website. Decl. ¶ 24.

26 Cognism allows potential customers the opportunity to try its platform for free.
 27 Compl. ¶ 9. Such potential customers first interface with a Cognism sales representative to
 28 receive a demonstration of the platform and to receive temporary log-in credentials.

1 Compl. ¶ 13. The temporary log-in credentials permit the trial user to use the full platform for a
 2 limited period of time or for a limited number of contact information downloads. Compl. ¶ 10.

3 One additional way that information about Mr. Kis can be accessed is through the Kaspr
 4 plug-in. *See* Compl. ¶¶ 24, 68. Kaspr is a plug-in or extension to an internet browser that allows
 5 an individual searching on the LinkedIn platform to view more information about that individual.
 6 *Id.* To use Kaspr, an individual must first register with Kaspr online and download the browser
 7 plug-in. Compl. ¶ 25. Once the user signs up and downloads the plug-in, the next time the user
 8 visits a LinkedIn profile, he or she can click on the in-browser Kaspr icon to reveal whether any
 9 additional information is available. Compl. ¶¶ 26-27, 71. Accordingly, as with the Cognism
 10 platform, Kaspr does not have any specific “landing pages” for specific individuals; everything is
 11 viewed from within the LinkedIn profile itself. Compl. ¶ 69; Decl. ¶ 35. Relatedly, Kaspr itself
 12 has no search functionality, and all searches for individuals must be performed within LinkedIn
 13 itself—Kaspr is merely a layer on top of the information that a LinkedIn profile provides. Decl.
 14 ¶ 36. If a user does not have a LinkedIn profile, Kaspr will not work. *See* Compl. ¶¶ 26, 69.

15 **Plaintiff Nicholas Kis.** Information concerning Mr. Kis was obtained by Cognism from
 16 third party data sellers Pipl and CoreSignal. Decl. ¶ 38. That information is contained within the
 17 Cognism platform, and information about Mr. Kis is also available through the Kaspr plug-in
 18 when navigating to Mr. Kis’ LinkedIn profile. Decl. ¶ 39. Mr. Kis was twice notified that
 19 information about him was being included in the Cognism platform; both times, he was given the
 20 opportunity to “opt out” and have his information removed, and neither time did he make such
 21 an election. Decl. ¶¶ 40-42.

22 The ***only*** way Plaintiff’s information could possibly appear to any user of Cognism’s
 23 platform would be when the platform itself was actually used. As such, a Cognism user could
 24 conduct a search for Mr. Kis specifically by his name, or the user could conduct a search with
 25 certain search criteria that would then list Mr. Kis if he fit that criteria. Mr. Kis’ name and
 26 information were never listed on Cognism’s public-facing website, www.cognism.com, and
 27 never used in any promotional material or advertisement. Decl. ¶ 45.

28

1 Cognism maintains records that allow it to see if an individual's information has been
 2 accessed, and how many times. Decl. ¶ 46. Following the filing of this action, Cognism
 3 checked to see the frequency of access to information regarding Mr. Kis. Mr. Kis has been listed
 4 only once in response to a customer inquiry. Decl. ¶ 48. That customer was Benjamin Osborn,
 5 one of Plaintiff's attorneys in this case. Decl. ¶ 48. Attorney Osborn gained access to
 6 Cognism's platform by representing to a Cognism sales representative that he often had "case
 7 ideas" where he thought someone violated the law, but needed a tool to help him "come up with
 8 people who'd bring suit" who, for example, worked for a particular employer or who lived in a
 9 particular geography. Decl. ¶ 49. Attorney Osborn suggested that Cognism's platform might
 10 facilitate that effort. Based on Attorney Osborn's representations, he was granted access to
 11 Cognism's platform from which he then accessed information relating to Mr. Kis. Decl. ¶ 50.
 12 ***No information relating to Mr. Kis has ever been accessed from Cognism's platform in***
 13 ***response to any search other than the one performed by Attorney Osborn.*** Decl. ¶ 51.

14 **LEGAL STANDARD**

15 Rule 12(b)(1). "If the court determines at any time that it lacks subject-matter
 16 jurisdiction, the court *must* dismiss the action." Fed. R. Civ. P. 12(h)(3) (emphasis added). "The
 17 party asserting subject matter jurisdiction bears the burden of establishing it." *Holley v. Gilead*
 18 *Scis., Inc.*, 410 F. Supp. 3d 1096, 1100 (N.D. Cal. 2019) (Tigar, J.) (citation omitted). A "Rule
 19 12(b)(1) jurisdictional attack may be facial or factual. In a facial attack, the challenger asserts
 20 that the allegations contained in a complaint are insufficient on their face to invoke federal
 21 jurisdiction. By contrast, in a factual attack, the challenger disputes the truth of the allegations
 22 that, by themselves, would otherwise invoke federal jurisdiction." *Safe Air*, 373 F.3d at 1039
 23 (citation omitted). "In resolving a facial attack, courts assume that the allegations are true, and
 24 draw all reasonable inferences in the plaintiff's favor." *Opperman v. Path, Inc.*, 87 F. Supp. 3d
 25 1018, 1035 (N.D. Cal. 2014) (Tigar, J.) (citation omitted). "In resolving a factual attack on
 26 jurisdiction, the district court may review evidence beyond the complaint without converting the
 27 motion to dismiss into a motion for summary judgment. The court need not presume the
 28 truthfulness of the plaintiff's allegations." *Safe Air*, 373 F.3d at 1039 (citations omitted).

1 Rule 12(b)(6). “To survive a motion to dismiss, a plaintiff must plead ‘enough facts to
2 state a claim to relief that is plausible on its face.’” *Opperman*, 87 F. Supp. 3d at 1035 (Tigar, J.)
3 (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “A claim has facial
4 plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable
5 inference that the defendant is liable for the misconduct alleged.” *Id.* (citing *Ashcroft v. Iqbal*,
6 556 U.S. 662, 678 (2009)). “On a motion to dismiss, the Court accepts the material facts alleged
7 in the complaint, together with all reasonable inferences to be drawn from those facts, as true.”
8 *Id.* at 1034-35 (citing *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001)). However, “the tenet
9 that a court must accept a complaint’s allegations as true is inapplicable to threadbare recitals of
10 a cause of action’s elements, supported by mere conclusory statements.” *Iqbal*, 556 U.S. at 678.
11 “[T]o be entitled to the presumption of truth, allegations . . . must contain sufficient allegations
12 of underlying facts to give fair notice and to enable the opposing party to defend itself
13 effectively.” *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011).

ARGUMENT

I. PLAINTIFF LACKS ARTICLE III STANDING BECAUSE HE HAS NOT SUFFERED A LEGALLY COGNIZABLE INJURY-IN-FACT, NOR IS ANY PURPORTED “INJURY” FAIRLY TRACEABLE TO COGNISM.

17 The Court lacks subject matter jurisdiction because Plaintiff does not have standing. It is
18 black-letter law that, to establish Article III standing, a plaintiff must demonstrate that he has
19 satisfied three irreducible requirements: (1) he has suffered an injury-in-fact (*i.e.*, the invasion of
20 a legally protected interest which is concrete and particularized, and actual or imminent, not
21 conjectural or hypothetical); (2) his injury is fairly traceable to the challenged action of the
22 defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed
23 by a favorable decision. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992).

24 Here, Plaintiff has made no such showing. Plaintiff generally alleges that he was injured
25 in four ways: “[1] through the unlawful taking of [his] valuable intellectual property; [2] through
26 the invasion of [his] privacy rights protected by statute and common law; [3] through Cognism’s
27 unlawful profiting from its exploitation of [his] name[], persona[], personal information, and the
28 content of [his] emails; and [4] through harm to peace of mind.” Compl. ¶ 42; *see also id.* ¶¶ 85,

1 103, 126. He also vaguely alludes to the possibility that at some unspecified time in the future,
 2 he may suffer identity theft or be defrauded. *See id.* ¶ 87. As discussed below, none of these
 3 purported “injuries” is legally sufficient to establish standing. And even if one was, none of
 4 these “injuries” could be considered “fairly traceable” to Cognism, because the only person who
 5 has ever searched for or viewed Plaintiff’s information is Plaintiff’s own attorney.

6 **A. Plaintiff Has Not Alleged Adequate Facts To Support *Any* Theory of Injury.**

7 Despite advancing numerous *theories* of purported injury, Plaintiff fails to allege *facts* to
 8 support any of them, and for that threshold reason, he lacks standing as to any of his claims.
 9 Where a plaintiff has neglected to allege facts to support a coherent theory of harm, that
 10 deficiency alone is sufficient to warrant dismissal of the claims for lack of standing. *Low v.*
 11 *LinkedIn Corp.* is instructive. No. 11-CV-01468-LHK, 2011 WL 5509848 (N.D. Cal. Nov. 11,
 12 2011). In *Low*, the plaintiff alleged that the defendant LinkedIn “allow[ed] transmission of
 13 users’ personally identifiable browsing history and other personal information to third parties . . .
 14 in violation of federal and state laws.” *Id.* at *1. The Court granted LinkedIn’s motion to
 15 dismiss for lack of subject matter jurisdiction because the plaintiff failed to allege specific facts
 16 sufficient to support injury (beyond conclusory allegations):

17 [Plaintiff] relies upon allegations that the data collection industry generally considers
 18 consumer information valuable, and that he relinquished his valuable personal information
 19 without the compensation to which he was due. . . . But [plaintiff] has failed to allege facts
 20 that demonstrate that he was economically harmed by [defendant’s] practices. [Plaintiff]
 21 has failed to allege how he was foreclosed from capitalizing on the value of his personal
 22 data or how he was “deprived of the economic value of [his] personal information simply
 23 because [his] unspecified personal information was [] collected by a third party.”

24 *Id.* at *2, 5 (citations omitted).

25 Here, Plaintiff similarly fails to allege specific facts as to *how* he was harmed by
 26 Cognism’s practices, *how* he was foreclosed from capitalizing on his identity by Cognism, or
 27 *how* he was deprived of the economic value of his identity by Cognism’s practices. His
 28 conclusory allegations of injury are thus insufficient as a matter of law, and compel the dismissal
 of his complaint. *See Wheaton v. Apple Inc.*, No. C 19-02883 WHA, 2019 WL 5536214, at *6
 (N.D. Cal. Oct. 25, 2019) (dismissing claim on standing grounds where the plaintiff “fail[ed] to

1 provide any evidence that anyone used the [challenged] function, let alone suffered an injury”
 2 and relied only on conclusory allegations of harm); *In re iPhone Application Litig.*, No. 11-MD-
 3 02250-LHK, 2011 WL 4403963, at *5 (N.D. Cal. Sept. 20, 2011) (“Plaintiffs have not yet
 4 articulated a ‘coherent and factually supported theory’ of injury. Plaintiffs have stated general
 5 allegations about the [defendants], the market for apps, and similar abstract concepts (e.g., lost
 6 opportunity costs, value-for-value exchanges), but Plaintiffs have not identified an actual injury
 7 to themselves sufficient for Article III standing.”); *see also LaCourt v. Specific Media, Inc.*,
 8 No. SACV 10-1256 GW JCGX, 2011 WL 1661532, at *5 (C.D. Cal. Apr. 28, 2011) (dismissing
 9 complaint for lack of standing where plaintiff “does not identify a single individual who was
 10 foreclosed from entering into a ‘value-for-value exchange’ as a result of [defendant’s] alleged
 11 conduct,” “there are no facts in the [complaint] that indicate that the Plaintiffs themselves
 12 ascribed an economic value to their unspecified personal information,” and plaintiffs “do not
 13 explain how they were ‘deprived’ of the economic value of their personal information simply
 14 because their unspecified personal information was purportedly collected by a third party.”).

15 **B. The Conduct Allegedly Giving Rise to Plaintiff’s Injuries Never Occurred.**

16 Yet even if Plaintiff’s conclusory allegations of harm were enough—they are not—
 17 Plaintiff lacks standing because none of the conduct he claims led to his purported injuries ever
 18 occurred. Cognism *never* displayed his information on its platform as part of any advertisement
 19 or solicitation; his information merely resides within Cognism’s platform itself, which is not
 20 challenged as unlawful. Decl. ¶¶ 20-30, 45. Furthermore, Plaintiff’s emails also were *never*
 21 intercepted or read by Cognism, and none of the information about Plaintiff contained within
 22 Cognism’s platform was obtained by such means. Decl. ¶¶ 15-17. Because the conduct that
 23 supposedly gave rise to Plaintiff’s “injuries” never occurred, Plaintiff has failed to adequately
 24 allege injury that could confer standing. *See Foster v. Essex Prop., Inc.*, No. 5:14-CV-05531-
 25 EJD, 2017 WL 264390, at *1-3 (N.D. Cal. Jan. 20, 2017) (dismissing complaint for lack of
 26 standing in data breach case where the plaintiffs’ allegation that their personal information
 27 including credit card numbers was stolen by hackers was contradicted by defendant’s sworn
 28 declarations showing that plaintiff never provided their credit card information to defendant and

1 plaintiffs' personal information was never stored on the breached servers, and thus the plaintiffs
 2 suffered no injury because their allegations were "factually impossible").

3 **C. The Use of a Person's Identity Is Not Theft of Intellectual Property.**

4 Even if Cognism had used Plaintiff's identity as he claims—which it did not—each of
 5 Plaintiff's purported claims of injury fail as a matter of law.

6 Plaintiff's repeated assertion that use of his identity constitutes theft of his intellectual
 7 property (see Compl. ¶¶ 83, 85, 93) does not make it so. *Callahan v. Ancestry.com Inc.* is
 8 instructive. No. 20-CV-08437-LB, 2021 WL 2433893 (N.D. Cal. June 15, 2021) ("Ancestry II").
 9 There, the plaintiffs challenged Ancestry's use of the plaintiffs' names and likenesses in
 10 promotional emails to sell paid subscriptions to its platform of personal and historical
 11 information (such as yearbook records) as violating the plaintiffs' statutory right of publicity. *Id.*
 12 at *1. The plaintiffs claimed in part that they were injured because the use of their identities in
 13 Ancestry's promotional emails constituted theft of their intellectual property. *Id.* The Court
 14 rejected the plaintiffs' contention, holding that the alleged use of their likenesses without
 15 permission was not theft of intellectual property where the likeness purportedly being used was
 16 that of a non-celebrity—that is, where there was no allegation that the plaintiffs were somehow
 17 deprived of commercial value or suffered some other separate injury. *Id.* at *5. As such, the
 18 Court granted Ancestry's motion to dismiss for lack of standing.

19 The application of the reasoning in *Ancestry II* to this case makes plain that Plaintiff has
 20 not adequately alleged standing. He does not claim he is a celebrity, nor does he claim (or could
 21 he claim) that he was in any way deprived of using his own likeness for commercial value.
 22 Accordingly, Plaintiff's assertion that use of his identity constitutes injury in the form of theft of
 23 his intellectual property should be rejected.

24 **D. A Mere Statutory Violation Is Insufficient to Establish Injury-In-Fact.**

25 Plaintiff also attempts to establish injury by claiming that Cognism violated certain
 26 statutory proscriptions contained in the CRPL and CIPA. Compl. ¶¶ 103, 110. This effort also
 27 fails. The Supreme Court has repeatedly recognized that a statutory violation is insufficient to
 28 constitute an injury-in-fact. In *Spokeo, Inc. v. Robins*, a consumer alleged that Spokeo—an

1 online “people search engine” platform—published inaccurate information about him in
 2 violation of the Fair Credit Reporting Act (“FCRA”). 578 U.S. 330, 333, *as revised* (May 24,
 3 2016). The Court held that the consumer “could not . . . allege a bare procedural violation,
 4 divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III,” as
 5 “Congress’ role in identifying and elevating intangible harms does not mean that a plaintiff
 6 automatically satisfies the injury-in-fact requirement whenever a statute grants a person a
 7 statutory right and purports to authorize that person to sue to vindicate that right” and “Article III
 8 standing requires a concrete injury even in the context of a statutory violation.” *Id.* at 341; *see*
 9 *also Ancestry II*, 2021 WL 2433893, at *3 (“There needs to be more than the statutory injury.”)

10 Here, Plaintiff has not articulated any cognizable injury beyond his claim of statutory
 11 violations. As such, he has failed to establish that he has standing to maintain this action.

12 **E. The Allegation That Defendant Profited From Use of a Person’s Identity
 13 Does Not Mean That Plaintiff Suffered An Injury-In-Fact.**

14 Plaintiff next asserts that Cognism “unlawful[ly] profit[ed] from its exploitation of [his]
 15 name[], persona[], personal information, and the content of . . . emails.” Compl. ¶¶ 42, 85, 93,
 16 125. However, Plaintiff’s own lawyer is the only one to have accessed information about
 17 Plaintiff on Cognism’s platform (and he did so in advance of paying for a subscription); no other
 18 user of Cognism’s platform has ever viewed Plaintiff’s information, and no user has ever paid a
 19 penny for doing so. Decl. ¶ 48. Consequently, Cognism has not profited from having Plaintiff’s
 20 information stored in its platform. *See Low*, 2011 WL 5509848, at *3 (dismissing complaint on
 21 standing grounds where “Plaintiff has not alleged that his [personal information] . . . was actually
 22 . . . transmitted to any third parties”; “Plaintiff was unable to articulate a theory of what
 23 information had actually been transmitted to third parties, how it had been transferred to third
 24 parties, and how LinkedIn had actually caused him harm.”)

25 Even if Cognism had received revenue as a result of Mr. Kis’ identity being accessed
 26 through its platform—it did not—that would still be insufficient to confer standing. It does not
 27 follow from the fact that Cognism generated revenue that Plaintiff was somehow injured as a
 28 result. In other words, Cognism’s profits are not Plaintiff’s injuries.

1 *In re Facebook, Inc., Consumer Priv. User Profile Litig.* is on all fours. 402 F. Supp. 3d
 2 767 (N.D. Cal. 2019). There, the plaintiff challenged Facebook’s practice of sharing users’
 3 personal information with third parties. *Id.* at 776. The Court rejected several of the plaintiffs’
 4 theories of harm:

5 [A]lthough it’s true that each user’s information is worth a certain amount of money to
 6 Facebook and the companies Facebook gave it to, it does not follow that the same information,
 7 when not disclosed, has independent economic value to an individual user. The plaintiffs do
 8 not plausibly allege that they intended to sell their non-disclosed personal information to
 someone else. Nor, in any event, do they plausibly allege that someone else would have
 bought it as a stand-alone product. The plaintiffs’ economic-loss theory is therefore purely
 hypothetical and does not give rise to standing.

9 *Id.* at 784 (citations omitted); *see Callahan v. Ancestry.com Inc.*, No. 20-CV-08437-LB, 2021
 10 WL 783524, at *5 (N.D. Cal. Mar. 1, 2021) (“*Ancestry I*”) (“plaintiffs do not have a commercial
 11 interest in their public profiles that precludes [] use of the profiles for commercial gain”).

12 **F. “Harm To Peace of Mind” Is Not a Legally Cognizable Injury-In-Fact.**

13 Plaintiff next vaguely alleges that he has suffered “harm to peace of mind” and is
 14 generally “uncomfortable” with Cognism’s business model. Compl. ¶¶ 42, 86. This is not a
 15 legally sufficient injury-in-fact. As an initial matter, Plaintiff’s allegations of “harm to peace of
 16 mind” are completely divorced from reality. Plaintiff asserts that he “is deeply uncomfortable in
 17 the knowledge that Cognism is using his name, photograph, and persona to advertise . . .”
 18 (Compl. ¶ 86), ***but no such advertisement using name, photograph or persona has ever***
 19 ***occurred.*** Decl. ¶¶ 20-30. He also claims that he is “deeply uncomfortable in the knowledge
 20 that Cognism intercepted and read the contents of his email communications to obtain his
 21 personal information” (Compl. ¶ 86), ***but Cognism has never intercepted or read even a single***
 22 ***one of Plaintiff’s emails.*** Decl. ¶¶ 15-17. Accordingly, any alleged mental anguish is
 23 implausible because the events that purportedly gave rise to his discomfort never occurred.

24 Yet, even if such events did occur, generalized allegations of “harm to peace of mind” are
 25 legally insufficient for standing purposes. *See Ancestry II*, 2021 WL 2433893, at *4 (“The
 26 plaintiffs contend that they suffered mental anguish from Ancestry’s use of their likenesses . . .
 27 There is no commercial loss or defamation here. . . . There is no other harm either. . . . There is
 28 only mental anguish here, and alone, it is not injury in fact.”) (citations and footnotes omitted);

1 *see also Doak v. Cap. One, N.A.*, No. 5:18-CV-07102-EJD, 2019 WL 4645162, at *4- 6 (N.D.
 2 Cal. Sept. 24, 2019) (dismissing complaint for lack of standing where plaintiff alleged “mental
 3 anguish” and “emotional distress” as a result of defendant improperly accessing the plaintiff’s
 4 consumer credit report); *Low*, 2011 WL 5509848, at *3 (dismissing complaint for lack of
 5 standing where plaintiff made conclusory allegations of ““embarrass[ment] and humiliati[on
 6 caused] by the disclosure of his [personal information]”). As a result, Plaintiff’s claims of
 7 mental distress—even beyond the fact that they are baseless—do not suffice to confer standing.
 8

9 **G. The Possible Risk of Identity Theft or Fraud Is Too Speculative To
 Constitute An Injury-In-Fact.**

10 Plaintiff’s final effort to create standing is his conclusory assertion that he is somehow at
 11 increased risk of identity theft or fraud. *See* Compl. ¶ 87. Not only is this speculative allegation
 12 baseless, but it is also insufficient to constitute an injury-in-fact. As an initial matter, the conduct
 13 Plaintiff complains of—that Cognism is using his identity to solicit subscribers, and that
 14 Cognism intercepted his email communications—could not have subjected Plaintiff to the risk of
 15 identity theft or fraud, because the alleged conduct never occurred. *See* Decl. ¶¶ 15-17, 20-30.
 16 Moreover, even if the alleged conduct had occurred, the potential risk of identity theft or fraud is
 17 too speculative to constitute an injury-in-fact. *In re Facebook, Inc. Consumer Privacy User
 Profile Litigation* is instructive. 402 F. Supp. 3d 767. There, plaintiffs asserted that “Facebook’s
 19 dissemination of their personal information increased the risk that they would become victims of
 20 identity theft.” *Id.* at 784. The Court held that the hypothetical increased risk of identity theft
 21 was insufficient to confer standing because it was too speculative. *Id.* *Accord Clapper v.
 Amnesty Int’l USA*, 568 U.S. 398, 410-14 (2013); *Verde v. Confi-Chek, Inc.*, No. 21 C 50092,
 23 2021 WL 4264674, at *5 (N.D. Ill. Sept. 20, 2021).

24 **H. Even If Plaintiff Were Able To Articulate An Injury, That Injury Is Not
 Fairly Traceable to Cognism, But To Plaintiff’s Attorney.**

26 In order for Plaintiff to have standing, “there must be a causal connection between the
 27 injury and the conduct complained of—the injury has to be fairly . . . trace[able] to the
 28 challenged action of the defendant.” *Lujan*, 504 U.S. at 560 (citation and quotations omitted).

1 Here, even if Plaintiff were able to allege some injury-in-fact, and as explained above he cannot,
 2 he still has and cannot adequately allege that any purported injury is “fairly traceable” to
 3 Cognism’s conduct because Plaintiff’s information was solicited and viewed only by Plaintiff’s
 4 own counsel—and nobody else. As a result, any purported “injury” was created by the conduct
 5 of Plaintiff’s counsel, not by Cognism. Where the plaintiff’s counsel is directly responsible for
 6 causing the alleged injury, that injury is not “fairly traceable” to the defendant. *See Butt v. FD*
 7 *Holdings, LLC*, 799 F. App’x 350, 353 (6th Cir. 2020) (plaintiff lacked standing to sue because
 8 the alleged injury—harm due to false information on his credit report—was caused by his own
 9 attorney’s failure to properly complete certain bankruptcy forms; “[a]ny injury that [the plaintiff]
 10 conceivably suffered was therefore self-inflicted, which means that it was not ‘fairly traceable to
 11 the challenged conduct of the defendant.’”) (citation omitted); *Gearhart v. Express Scripts, Inc.*,
 12 422 F. Supp. 3d 1217, 1223-24 (E.D. Ky. 2019) (plaintiff lacked standing because the alleged
 13 injury—the payment of a fee to obtain medical records—was fairly traceable to plaintiff’s
 14 counsel’s decision, not defendant’s conduct; “Plaintiff’s alleged injury does not result from any
 15 conduct of [the defendant]. Rather, Plaintiff’s injury stems directly and entirely from his
 16 lawyers’ . . . decision to pay [] for records as opposed to employing the means necessary to
 17 obtain the records for free.”). Based on the above, Plaintiff does not have standing to bring any
 18 of his causes of action, and his complaint should be dismissed.

19 **II. PLAINTIFF DOES NOT ADEQUATELY ALLEGE A STATUTORY RIGHT-OF-
 20 PUBLICITY CLAIM OR A COMMON LAW MISAPPROPRIATION CLAIM.**

21 To state a claim for common law misappropriation under California law, a plaintiff must
 22 show: (1) the defendant’s use of the plaintiff’s identity; (2) the appropriation of plaintiff’s name
 23 or likeness to defendant’s advantage, commercially or otherwise; (3) lack of consent; and
 24 (4) resulting injury. *Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d 407, 413-14 (9th Cir. 1996).
 25 To state a statutory right-of-publicity claim under Section 3344, a plaintiff must allege the
 26 aforementioned four elements, limited to commercial appropriations, plus two additional
 27 elements: (5) knowing use by the defendant; and (6) a direct connection between the alleged use
 28 and a commercial purpose. *Id.* at 414; *see* Cal. Civ. Code § 3344(a) (“Any person who

knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent . . . shall be liable for any damages sustained by the person or persons injured as a result thereof.”)

5 Here, both the Publicity Claim and Common Law Claim fail because Plaintiff has not
6 adequately alleged that Cognism has used or appropriated Plaintiff's identity, and because
7 Plaintiff has not adequately alleged that he has suffered any resulting injury.

A. Cognism Has Not Used Or Appropriated Plaintiff's Identity In A Manner That Gives Rise To Either His Publicity Claim or His Common Law Claim.

10 As an initial matter, certain of the words in the Complaint must be clarified. In Paragraph
11 59 of the Complaint, Plaintiff asserts that “Cognism displays a profile of personal information
12 about Mr. Kis on www.cognism.com, which Cognism intends to be used by B2B marketers and
13 salespeople who wish to contact Mr. Kis with unsolicited promotions.” Compl. ¶ 59. As noted in
14 the declaration of Mr. Isilay, Plaintiff’s name and information have never been listed on
15 Cognism’s public-facing website—ever. *See supra* p. 6. Rather, Plaintiff’s identity only appears
16 within the Cognism platform itself when it is used by a Cognism customer. *See supra* p. 6.
17 Indeed, Plaintiff’s counsel appears to be well-aware of this fact given that the screenshots included
18 in his Complaint are from Cognism’s platform and not from Cognism’s public-facing website.
19 *See, e.g.*, Compl. ¶¶ 60-62. Moreover, Plaintiff himself explains that “Cognism does not sell
20 cognism.com subscriptions to the general public, nor can the general public access profiles on
21 cognism.com.” Compl. ¶ 13. Accordingly, we understand the Complaint to allege that Mr. Kis’
22 name and information could be accessed “through” the Cognism platform, which in turn could be
23 accessed “through” Cognism’s website. Because we fully expect Plaintiff not to contest this
24 interpretation of his Complaint in his response to this motion, we will proceed with that
25 understanding of the Complaint. Properly construed, Plaintiff’s Publicity Claim and Common
26 Law Claim then boil down to a challenge to Cognism’s inclusion of Plaintiff’s identity in its
27 platform. Compl. ¶¶ 60-66. But this is not enough.

1 To sustain each of the Publicity and Common Law Claims, Plaintiff must specifically
 2 allege that Cognism used his name or information in an advertisement or promotion that was not
 3 the use of the platform itself. *See Brooks v. Thomson Reuters Corp.*, No. 21-CV-01418-EMC,
 4 2021 WL 3621837, at *4 (N.D. Cal. Aug. 16, 2021) (finding it persuasive that “this is not a right
 5 of publicity case because Thomson Reuters is not using Plaintiffs’ name or likeness ‘for
 6 promotional purposes,’ *i.e.*, *to advertise or promote a separate product or service*”; “Virtually all
 7 right of publicity cases involve the use of a person’s name or likeness *to advertise a separate*
 8 *product or service.*”) (citations omitted) (emphasis added); *see also Camacho v. Control Grp.*
 9 *Media Co., LLC*, No. 21-CV-1954-MMA (MDD), 2022 WL 3093306, at *25 (S.D. Cal. July 18,
 10 2022) (“As to this requirement, ‘[a] review of the cases finding that commercial speech violates
 11 the right of publicity strongly suggests that advertisements are actionable when the plaintiff’s
 12 identity is used, without consent, *to promote an unrelated product.*’”) (citations and footnote
 13 omitted) (collecting cases) (emphasis added), *appeal filed*, No. 22-55735 (9th Cir. Aug. 3, 2022);
 14 J. THOMAS McCARTHY & ROGER E. SCHECHTER, 1 RIGHTS OF PUBLICITY AND PRIVACY § 5:19 (2d
 15 ed. May 2022 Update) (explaining the fundamental premise of a right of publicity claim is that a
 16 person’s identity must be used “to draw attention to a product or advertisement”).

17 Here, it is not alleged—nor could it be—that Cognism uses Plaintiff’s information in
 18 connection with any advertising or promotional material. *See supra* p. 6. In contrast to some of
 19 its competitors, Cognism’s platform does not contain “teaser profiles,” “landing pages,” “preview
 20 pages,” or other standalone marketing pages that contain promotional material connected to a
 21 specific person’s identity. *See supra* p. 5. Instead, Cognism uses fictitious profiles as part of its
 22 promotional marketing campaigns or uses information belonging to Cognism employees who have
 23 consented to the use of their identities in promotional materials. *See supra* p. 5.

24 That Cognism does not use teaser profiles on any public-facing website is critical, because
 25 certain cases in which courts have allowed right-of-publicity and misappropriation claims to
 26 survive motions to dismiss have relied on the presence of the teaser profile as the relevant loci for
 27 finding a use or appropriation. For example, in *Callahan v. PeopleConnect, Inc.*, the plaintiff sued
 28 a yearbook aggregator website under Section 3344. No. 20-CV-09203-EMC, 2021 WL 5050079,

1 at *1-2 (N.D. Cal. Nov. 1, 2021), *motion to certify appeal denied*, 2022 WL 2132912 (N.D. Cal.
 2 June 14, 2022). In that case, on the defendant’s website, if a visitor typed the plaintiff’s name into
 3 the search bar, the website “display[ed] a page showing the photograph of [the plaintiff] and his
 4 name, accompanied by a link marked ‘Own this yearbook today,’ which le[d] to a page soliciting
 5 the purchase of the yearbook for \$99.95.” *Id.* at *1. Similarly, “when the search results
 6 provide[d] the records associated with [the plaintiff], adjacent to the list of records containing [his]
 7 name, photograph, and likeness [was] an advertisement promoting the subscription membership.”
 8 *Id.* (quotations omitted). By contrast, Cognism’s platform has no such “teaser” advertisement on
 9 any page with Plaintiff’s identity. *See supra* p. 5.

10 In fact, the presence of a teaser profile has been a dispositive consideration for courts in
 11 allowing right-of-publicity claims to survive motions to dismiss. *See, e.g., Kellman v. Spokeo,*
 12 *Inc.*, No. 3:21-CV-08976-WHO, 2022 WL 1157500, at *1 (N.D. Cal. Apr. 19, 2022) (“To
 13 advertise paid subscriptions to the site, Spokeo uses ‘teasers’—profiles of real people with some
 14 information redacted.”), *motion to certify appeal denied*, 2022 WL 2965399 (N.D. Cal. July 8,
 15 2022); *Martinez v. ZoomInfo Techs. Inc.*, No. C21-5725 MJP, 2022 WL 1078630, at *1 (W.D.
 16 Wash. Apr. 11, 2022) (“when a user searches for an individual either on a search engine or
 17 ZoomInfo, ZoomInfo displays ‘teaser profiles’ showing some information about the individual
 18 and offering ‘full access’ in exchange for a fee-based subscription”), *appeal filed*, No. 22-35305
 19 (9th Cir. Apr. 15, 2022).⁴

20 By contrast, Cognism does not use teaser profiles. Names within its platform can only be
 21 accessed by actual customers, whether they are paying subscribers or potential subscribers who
 22 have availed themselves of Cognism’s free trial. *See supra* pp. 5-6. And the available information
 23 is the same in all instances—no information about any particular individual is held back during the

24
 25 ⁴ *See also Boshears v. PeopleConnect, Inc.*, No. C21-1222 MJP, 2022 WL 888300, at *1
 26 (W.D. Wash. Mar. 25, 2022) (visitors are presented with a “‘banner ad’ adjacent to photographs
 27 of an individual for whom the user searched” to promote a paid subscription), *appeal filed*, No.
 28 22-35262 (9th Cir. Mar. 28, 2022); *Siegel v. ZoomInfo Techs., LLC*, No. 21 C 2032, 2021 WL
 4306148, at *1, 3 (N.D. Ill. Sept. 22, 2021) (“ZoomInfo creates landing pages for each individual
 found within its database that features the individual’s full name, alongside certain uniquely
 identifying information such as the individual’s location and a preview of the individual’s
 [information]”; “The free previews are part of ZoomInfo’s efforts to sell its product.”)

1 trial, and no information about any person is used to advertise the platform. *See supra* p. 6. Put
 2 simply, the platform from which a Cognism customer could get information about Plaintiff *is* itself
 3 the product. And because the “list” containing Plaintiff’s information is itself the product, there is
 4 no use of the Plaintiff’s identity that is distinct from the product itself and thus no
 5 misappropriation of the Plaintiff’s identity that gives rise to a valid legal claim.

6 To this point, *Brooks v. Thomson Reuters* is instructive. 2021 WL 3621837. There, the
 7 plaintiffs sued Thomson Reuters for collecting a “dossier” of plaintiffs’ information, which
 8 included names, criminal history and social network information. *Id.* at *1. The Court held that
 9 such use “is not a misappropriation of their name or likeness to advertise or promote a *separate*
 10 product or service.” *Id.* at *4 (emphasis in original) (collecting right-of-publicity cases involving
 11 promotion of separate products). The Court reasoned that “[t]he use of a person’s name and
 12 likeness to promote a product (*other than that which pertains to the person themselves*) is the
 13 essence of an ‘appropriation’ of one’s name or likeness.” *Id.* at *5 (emphasis added).
 14 “Plaintiffs’ name or likeness . . . were not [used] to advertise or promote the [] platform or some
 15 other third party’s products or services; they were sent only to [] subscribers who deliberately
 16 paid Thomson Reuters to receive information about them.” *Id.* The Court thus concluded that
 17 “Plaintiffs ha[d] failed to state a claim for a violation of the right of publicity because Thomson
 18 Reuters did not appropriate their name or likeness.” *Id.*; *accord Camacho*, 2022 WL 3093306, at
 19 *26 (“[T]he issue boils down to whether Plaintiff [] sufficiently alleges Defendants use Plaintiff
 20 Cotta’s identity to promote a product that is *separate and different from the entire product or*
 21 *service that Defendants advertise.*”) (emphasis added).⁵ Simply put, courts recognize that there

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23 ⁵ *See also Dobrowolski v. Intelius, Inc.*, No. 17 CV 1406, 2018 WL 11185289, at *3 (N.D.
 24 Ill. May 21, 2018) (“The marketing page lists defendants’ reports . . . and for each listing there is
 25 a preview of the information The plaintiffs’ identities are not used to promote a separate
 26 product—they are used because plaintiffs’ identities are part of the product offered for sale.”)
 27 (citations omitted); *Thompson v. Getty Images (US), Inc.*, No. 13 C 1063, 2013 WL 3321612, at
 28 *2 (N.D. Ill. July 1, 2013) (IRPA “does not prohibit the mere sale of someone’s photograph.
 Rather, the IRPA prohibits the use of an individual’s image *to promote or entice the purchase of*
 29 *some other product than the photograph itself.*”) (citations omitted) (emphasis added); *U.S. News & World Rep., Inc. v. Avrahami*, Nos. 95-1318 (Law), 96-203 (Chancery), 1996 WL 1065557, at *7 (Va. Cir. Ct. June 13, 1996) (“The inclusion of a name as part of a larger mailing list . . . does
 not constitute use of each one of those names as part of an advertisement or solicitation for
 patronage of a particular product or service.”) (citation and quotations omitted).

1 can be no separate appropriation where Plaintiff's identity is *itself* the product.⁶

2 In sum, because Cognism does not use teaser profiles that include any personally
 3 identifiable information, and because Plaintiff's identity is itself part-and-parcel of Cognism's
 4 product, Cognism does not use or appropriate Plaintiff's identity in any separate advertising or
 5 solicitation, and Plaintiff's Publicity Claim and Common Law Claim thus both must fail.

6 **B. Plaintiff Has Not Adequately Alleged That He Has Suffered Any Injury.**

7 Plaintiff's Common Law and Publicity Claims also fail because he has not adequately
 8 pled any resulting legally cognizable injury stemming from the alleged use. *See Cohen v.*
 9 *Facebook, Inc.*, 798 F. Supp. 2d 1090, 1097 (N.D. Cal. 2011) (dismissing statutory and common
 10 law right-of-publicity claims for lack of injury where "plaintiffs' sole allegation relating to injury
 11 is the conclusory assertion, repeated at least twice in the complaint, that they 'have suffered
 12 injury-in-fact by having their name[s] and likeness[es] misappropriated without their knowledge
 13 or consent.'") (citation omitted). For the same reasons that Plaintiff has not suffered an Article
 14 III injury-in-fact, *see supra* Section I, Plaintiff has not suffered any resulting injury here.

15 **III. PLAINTIFF DOES NOT ADEQUATELY ALLEGE A VIOLATION OF
 16 SECTIONS 631, 632 AND 637 OF THE CALIFORNIA INVASION OF PRIVACY
 ACT ("CIPA").**

17 Plaintiff has not stated a claim under the California Invasion of Privacy Act ("CIPA"),
 18 Cal. Penal Code §§ 630 *et seq.* Although pled as a single cause of action, Plaintiff asserts claims
 19 under three different CIPA sections: Section 631 for wiretapping, Section 632 for eavesdropping
 20 on or recording confidential communications, and Section 637 for the disclosure of telegraphic
 21 or telephonic messages. None of the sections cited by Plaintiff state a valid cause of action.

22 **A. Section 631**

23 "The California Supreme Court has held that section 631 protects against three distinct
 24 types of harms: 'intentional wiretapping, willfully attempting to learn the contents or meaning of

25
 26
 27 ⁶ Because there has been no appropriation, there necessarily is no "direct connection"
 28 between any appropriation and any commercial purpose for the Statutory Claim. *E.g., Cross v.*
Facebook, Inc., 14 Cal. App. 5th 190, 211 (2017) (finding no likelihood of success on statutory
 right-of-publicity claim where "[Plaintiff] has not even alleged . . . that any advertiser used his
 name [and] thus cannot establish that anyone . . . obtained an advantage through [its] use").

1 a communication in transit over a wire, and attempting to use or communicate information
 2 obtained as a result of engaging in either of the previous two activities.”” *In re Google Inc.*,
 3 No. 13-MD-02430-LHK, 2013 WL 5423918, at *15 (N.D. Cal. Sept. 26, 2013) (citation
 4 omitted), *motion to certify appeal denied*, 2014 WL 294441 (N.D. Cal. Jan. 27, 2014). Here,
 5 Plaintiff’s Section 631 claim fails because Plaintiff does not adequately allege that: (1) Cognism
 6 tapped or intercepted any communication “in transit,” and (2) Cognism collected or used the
 7 substantive “contents” of any communication.

8 *First*, the Complaint does not allege specific facts that Cognism taps or intercepts any
 9 communications that are “in transit.” Nor could there be any such good faith allegation as
 10 Cognism does not engage in any such interception. *See supra* pp. 4-5. Rather, despite
 11 repeatedly using the expression “captures, intercepts, and stores” (Compl. ¶ 20), what Plaintiff
 12 really complains about is Cognism’s method for “community-sourced data” collection, whereby
 13 certain Cognism customers have expressly consented to Cognism capturing signature block
 14 information from their own stored email folders. Compl. ¶¶ 20-22. This collection of stored
 15 communications does not constitute a tap or interception within the meaning of CIPA, which
 16 requires interception contemporaneous with transmission.

17 In *Opperman v. Path.*, the Court dismissed Wiretap Act and CIPA claims precisely
 18 because there was no alleged contemporaneous interception of any communication. 87 F. Supp.
 19 3d at 1063-64 (Tigar, J.). There, the plaintiffs sued Apple and app developers alleging the
 20 surreptitious stealing and dissemination of contact information stored on phones in violation of
 21 the Wiretap Act and CIPA, among other claims. *Id.* at 1029-30. The Court dismissed both
 22 wiretap claims because there was no contemporaneous interception:

23 The [complaint] fails to allege that Defendant intercepted any communication
 24 contemporaneously with its transmission. Although [Defendant] allegedly transmitted the
 25 Class Members’ Contact Address Books from [Plaintiffs’] mobile devices to [Defendant’s]
 servers, [Defendant] did not intercept a communication to do so. Similarly, the Ninth Circuit
 has noted that *interception means communication contemporaneous with transmission*.

26 *Id.* at 1063 (citations and quotations omitted) (emphasis added). *See also In re Vizio, Inc.*,
 27 *Consumer Priv. Litig.*, 238 F. Supp. 3d 1204, 1227-28 (C.D. Cal. 2017) (dismissing Wiretap Act
 28 and CIPA claim where “Plaintiffs have not articulated with sufficient clarity when [defendant]

1 supposedly intercepted their communications” beyond “their conclusory allegation that
 2 [defendant] intercepted their electronic communications ‘during transmission’”) (emphasis
 3 added) (citation omitted); *Bradley v. Google, Inc.*, No. C 06-05289 WHA, 2006 WL 3798134, at
 4 *5-6 (N.D. Cal. Dec. 22, 2006) (dismissing ECPA and CIPA claims). Because Plaintiff has
 5 not—and cannot—allege that any of his email communications were contemporaneously
 6 intercepted (or intercepted at all), Plaintiff’s Section 631 claim should be dismissed.

7 *Second*, Plaintiff’s Section 631 claim also fails because Plaintiff does not adequately
 8 allege that Cognism collects or uses the substantive contents of any email communication.
 9 “[T]he term ‘contents’ refers to the *intended message conveyed by the communication*, and does
 10 not include record information regarding the characteristics of the message that is generated in
 11 the course of the communication.” *In re Zynga Priv. Litig.*, 750 F.3d 1098, 1106-07 (9th Cir.
 12 2014) (contents are the “substance, purport, or meaning” of a communication) (emphasis added).
 13 Here, Plaintiff alleges that Cognism’s software “extracts contact, job title, and other information
 14 from email signature blocks.” Compl. ¶ 80. But the email signature blocks that were collected
 15 are not the “contents” of a communication within the meaning of CIPA.

16 The decision in *In re iPhone Application Litig.* is instructive on this point. There, the
 17 Court dismissed a Wiretap Act claim because certain automatically generated data about a
 18 telephone call (e.g., information about the location of parties to a phone call) was not content
 19 capable of interception, reasoning that “content is limited to information the user intended to
 20 communicate, such as the words spoken in a phone call” and thus “data [that] is generated
 21 automatically . . . does not constitute content susceptible to interception.” 844 F. Supp. 2d 1040,
 22 1061 (N.D. Cal. 2012) (quotations omitted). “[T]he Court conclude[d] that . . . personally
 23 identifiable information that is automatically generated by the communication but that does not
 24 comprise the *substance, purport, or meaning* of that communication is not covered.” *Id.* at 1062
 25 (emphasis added). So too here. Contact information in email signatures does not “comprise the
 26 substance, purport, or meaning” of any communication. *See In re Zynga Priv. Litig.*, 750 F.3d at
 27 1107 (“[A]n allegation that [defendants] disclosed personally identifiable information is not
 28 equivalent to an allegation that they disclosed the contents of a communication.”; “The referer

1 [sic] header information that [defendants] transmitted to third parties included the user’s
 2 Facebook ID [which] does not meet the definition of ‘contents,’ because these pieces of
 3 information are not the ‘substance, purport, or meaning’ of a communication.”); *Svenson v.*
 4 *Google Inc.*, 65 F. Supp. 3d 717, 720, 730 (N.D. Cal. 2014) (a “user’s name, email address,
 5 Google account name, home city and state, zip code, and [] telephone number” were not the
 6 “contents of a communication” under the Stored Communications Act).

7 **B. Section 632**

8 To the extent Plaintiff’s Privacy Claim is premised on Section 632, that also fails. That
 9 Section makes a person liable if he/she “intentionally and without the consent of all parties to a
 10 *confidential communication, uses an electronic amplifying or recording device to eavesdrop*
 11 *upon or record the confidential communication.*” Cal. Penal Code § 632 (emphasis added). “To
 12 state a claim under section 632, a plaintiff must allege [1] an electronic recording of or
 13 eavesdropping [2] on a confidential communication, and [3] that not all parties consented to the
 14 eavesdropping.” *In re Google Inc.*, 2013 WL 5423918, at *15 (citation omitted). Here, Plaintiff
 15 has not alleged facts to support any of these elements.

16 *First*, Plaintiff has not alleged the use of any electronic amplifying or recording device to
 17 eavesdrop upon or record any conversation at all. “California courts interpret ‘eavesdrop,’ as
 18 used in section 632, to refer to a third party secretly listening to a conversation between two
 19 other parties.” *In re Google Assistant Priv. Litig.*, 457 F. Supp. 3d 797, 827 (N.D. Cal. 2020)
 20 (citations omitted); *Ades v. Omni Hotels Mgmt. Corp.*, 46 F. Supp. 3d 999, 1017 (C.D. Cal.
 21 2014) (“Specifically, § 632 holds liable anyone who ‘eavesdrops upon or records’ a *telephone*
 22 *communication*”) (emphasis added). Plaintiff has not alleged that Cognism secretly listened in or
 23 recorded any conversation, nor has he alleged how one could eavesdrop upon or make an
 24 electronic recording of a written email communication. *See Diamond v. Google, Inc.*, No. CIV-
 25 1202715, slip op. at 2 (Cal. Super. Ct., Marin Cnty. Nov. 9, 2012) (dismissing CIPA Section 632
 26 claim for email communications because “Plaintiff [] does not explain how Google could have
 27 possibly ‘overheard’ the emails, ‘by means of any electronic amplifying or recording device’”

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1 and “also has not alleged facts showing that Google’s practice constituted ‘recording’ of the
 2 emails . . . [T]he complaint does not show ‘eavesdropping’ within the meaning of section 632.”)

3 *Second*, Plaintiff’s claim fails because one does not have an objectively reasonable
 4 expectation that emails are confidential; rather, they can be shared beyond the recipient without
 5 the sender’s consent. In *In re Google Inc.*, the Court dismissed a Section 632 claim relating to
 6 emails because “Plaintiffs have not plausibly alleged that they had an objectively reasonable
 7 expectation that their email communications were ‘confidential’ under the terms of section 632.”
 8 2013 WL 5423918, at *23 (footnote omitted). The Court reasoned that “email services are by
 9 their very nature recorded on the computer of at least the recipient, who may then easily transmit
 10 the communication to anyone else who has access to the internet or print the communications.”
 11 *Id.*; *see also Campbell v. Facebook Inc.*, 77 F. Supp. 3d 836, 849 (N.D. Cal. 2014) (“California
 12 appeals courts have generally found that Internet-based communications are not ‘confidential’
 13 within the meaning of section 632, because such communications can easily be shared by, for
 14 instance, the recipient(s) of the communications.”) (collecting cases) (citations omitted).

15 **C. Section 637**

16 Plaintiff’s Section 637 claim for the disclosure of the “contents of a telegraphic or
 17 telephonic message” also fails. Section 637 makes liable a “person not a party to a telegraphic or
 18 telephonic communication who willfully discloses the contents of a telegraphic or telephonic
 19 message, or any part thereof, addressed to another person, without the permission of that
 20 person.” Cal. Penal Code § 637. Emails are not communications using telephone or telegraph
 21 wires in any reasonable understanding of those words. *See Diamond*, CIV-1202715, slip op. at 2
 22 (dismissing CIPA claim because “Plaintiff’s view of the phrase ‘telegraph or telephone wire’ [as
 23 encompassing emails] . . . is contrary to common sense and long-accepted principles of statutory
 24 interpretation. . . . Plaintiff alleges no facts allowing email communications to be characterized
 25 as ‘telephone’ or ‘telegraph’ transmissions.”) (citation omitted).⁷

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28 ⁷ The “telegraphic or telephonic” language of Section 637 was enacted in 1967—well before
 the advent of email communications—and thus could not possibly be intended to cover emails.

1 Here, Plaintiff has not even alleged the presence of any telegraphic or telephonic
2 communication, or that he (or Cognism) participated in any such conversation. Plaintiff simply
3 has alleged no facts about *any* “telegraphic” or “telephonic” communication. Plaintiff also
4 therefore has not specifically alleged that any information about him obtained from a telegraphic
5 or telephonic communication was disclosed to anyone, nor could he as it never was. Moreover,
6 just as for the Section 631 claim, Plaintiff has only alleged email signature information was
7 collected, which is not the “contents” of any communication under CIPA. *See supra* pp. 22-23.

9 | **IV. PLAINTIFF DOES NOT ADEQUATELY ALLEGE A VIOLATION OF THE**
CALIFORNIA UNFAIR COMPETITION LAW (“UCL”).

10 Plaintiff cannot state a claim under California’s Unfair Competition Law (“UCL”). To
11 have standing to assert a UCL claim, Plaintiff must adequately allege a loss of money or
12 property. *In re iPhone Application Litig.*, 844 F. Supp. 2d at 1071. Here, Plaintiff’s UCL claim
13 fails because he has not done so. For the same reasons Plaintiff has not suffered an injury for
14 Article III standing, *see supra* Section I, he has not suffered any loss of money or property. *See*
15 *Opperman*, 87 F. Supp. 3d at 1058 (Tigar, J.) (“The Court will also dismiss Plaintiffs’ UCL
16 claims . . . because, in order to have standing to assert their UCL claims, Plaintiffs must show
17 that they ‘lost money or property,’ and . . . they have failed to make such a showing.”) (citation
18 omitted). This is especially so because “the standard [for UCL standing] is [] *more restrictive*
19 than the Constitutional standing requirement of ‘injury in fact.’” *Cohen*, 798 F. Supp. 2d at 1098
20 (emphasis added) (citation omitted). Moreover, “[n]umerous courts have held that a plaintiff’s
21 ‘personal information’ does not constitute money or property under the UCL.” *In re iPhone*
22 *Application Litig.*, 2011 WL 4403963, at *14 (collecting cases). Nor does the content of their
23 internet communications. *See Campbell*, 77 F. Supp. 3d at 849 (“courts have consistently
24 rejected” argument that consumers “have a property interest in their personal information,
25 including the content of their messages”) (citations omitted). Because Plaintiff has not suffered a
26 loss of money or property, his UCL claim should be dismissed.

CONCLUSION

28 || For the reasons set forth herein, the Complaint should be dismissed.

1 Respectfully submitted,

2 Dated: 12/12/2022

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